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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF NEVADA

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5 REYNALDO AGAVO,

Case No. 2:13-cv-01741-JCM-CWH

6 Petitioner,

ORDER

7 v.

8 DWIGHT NEVEN, *et al.*,

9 Respondents.

10 This counseled habeas petition pursuant to 28 U.S.C. § 2254 comes before the court on  
11 respondents' motion to dismiss Ground Seven of the second amended petition. (ECF No. 56).  
12 Petitioner has opposed (ECF No. 59), and respondents have replied (ECF No. 64).

13 **Procedural Background**

14 Petitioner filed his federal habeas petition on September 23, 2013. (ECF No. 1). The court  
15 appointed counsel and granted leave to file an amended petition, which counsel did on October 6,  
16 2014. (ECF Nos. 4 & 15). The amended petition added a claim not in the original petition: Ground  
17 Seven, which alleged that Natalia Diaz, a witness against petitioner in his criminal case, was paid  
18 excessive amounts of money in exchange for her testimony, that the State failed to disclose these  
19 payments to the defense, and that the State failed to correct Diaz when on the stand she denied  
20 receiving any benefit for her testimony. Shortly after filing his amended federal petition, petitioner  
21 filed a second state habeas petition to exhaust Ground Seven of his amended federal petition. (Ex.  
22 194).<sup>1</sup>

23 Respondents moved to dismiss the amended petition as untimely and partially unexhausted.  
24 (ECF No. 28). Relevant to the instant motion, the court found Ground Seven timely under 28  
25 U.S.C. § 2244(d)(1)(D). (ECF No. 43). Because Ground Seven was unexhausted and the court  
26 found good cause for the failure to first exhaust the claim in state court before filing in federal  
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28 <sup>1</sup> The exhibits cited in this order, comprising the relevant state court record, are located at ECF Nos. 16-25, 35 & 46.

1 court, the court granted petitioner a stay to pursue his second state petition and exhaust the claim.  
2 (*Id.*)

3 The state courts ultimately denied the second petition as successive and untimely. (Exs.  
4 210 & 218). Petitioner then filed motions moved to re-open this action and for leave to file a  
5 second amended petition, both of which the court granted. (ECF Nos. 45, 47 & 49). Based on the  
6 state courts' findings dismissing the second state petition as procedurally barred, respondents again  
7 move to dismiss Ground Seven as untimely, or in the alternative, procedurally defaulted. (ECF  
8 No. 56).

### 9 **Timeliness**

10 The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year  
11 statute of limitations that runs from the latest of several specified dates. 28 U.S.C. § 2244(d)(1).  
12 The court previously found Ground Seven timely under § 2244(d)(1)(D), (ECF No. 43 at 15), and  
13 petitioner does not argue that Ground Seven is timely under any other provision. Section  
14 2244(d)(1)(D) renders timely a claim filed within one year of "the date on which the factual  
15 predicate of the claim or claims presented could have been discovered through the exercise of due  
16 diligence." 28 U.S.C. § 2244(d)(1)(D).

17 Ground Seven asserts that the State "committed a *Brady* violation when it failed to disclose  
18 to the defense ... excessive witness payments—over \$2,500 in total—it had paid to Natalia Diaz,  
19 the mother of the victim, for her and V.D.'s testimony against Agavo."<sup>2</sup> The petition outlines the  
20 specific ways in which, petitioner alleges, both Diaz and V.D. were paid in excess of what they  
21 were statutorily entitled to under Nev. Rev. Stat. § 50.225. It also alleges that the state violated  
22 *Napue v. Illinois*, 360 U.S. 264, 269 (1959) by failing to correct Diaz's testimony at trial when she  
23 stated she had received no benefit for her testimony. (ECF No. 50 at 29-41).

24 In its order on respondents' first motion to dismiss, the court held that "[p]etitioner was not  
25 put on notice that the State had been making payments to witnesses," despite the fact that § 50.225  
26 authorized such payments, because the claim was that witnesses were being paid more than what  
27 was authorized by statute, Diaz denied on the stand that she had received any money, and the State

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28 <sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

1 failed to correct her. (ECF No. 43 at 15). The court noted that it was not until a series of newspaper  
2 articles in late 2013, which related to alleged overpayment of witnesses by the state, that petitioner  
3 was alerted to the possibility that witnesses in his case might have been overpaid. (*Id.*) Appointed  
4 counsel investigated and, after a laborious search, uncovered evidence in June and July 2014  
5 indicating, petitioner asserts, that the witnesses had been overpaid. (*Id.* at 15-16). The court  
6 concluded that the amended petition, filed on October 6, 2014, was thus filed “within one year of  
7 when the evidence could have been first discovered through the exercise of due diligence.” (*Id.* at  
8 16).

9 In addressing whether petitioner had established cause and prejudice to excuse the  
10 procedural bar of his second petition, the Nevada Court of Appeals held:

11 Given Agavo’s knowledge and use of [the witness payment] program, he failed to  
12 demonstrate an impediment external to the defense prevented him from discovering  
13 that the State also used the witness fee program because this information could have  
14 been reasonably discovered by the defense with sufficient time to raise any related  
15 claims in his prior petition. *See Rippo v. State*, 113 Nev. 1239, 1258, 946 P.2d 1017,  
16 1029 (1997) (explaining that a statement was not withheld because the defense  
17 could have inspected the State’s case files and discovered the statement itself);  
18 *Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) (“*Brady* does not  
19 require the State to disclose evidence which is available to the defendant from other  
20 sources, including diligent investigation by the defense.”); *see also United States v.*  
*Dupuy*, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) (“Since suppression by the  
Government is a necessary element of a *Brady* claim, if the means of obtaining the  
exculpatory evidence has been provided to the defense, the *Brady* claim fails.”  
(internal citation omitted)). Because Agavo could reasonably have discovered this  
information in a timely manner, he failed to demonstrate an impediment external to  
the defense prevented him from complying with the procedural bars. *See Hathaway*  
*v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Therefore, we conclude the  
district court properly concluded Agavo did not [sic] good cause sufficient to  
overcome the procedural bars.

21 (Ex. 218 at 4). The state courts also concluded that there was no evidence that Diaz was overpaid.  
22 (*Id.* at 5-6). The Nevada Court of Appeals further noted that petitioner could have discovered that  
23 Diaz had been paid simply by interviewing her in a timely manner. (*Id.* at 6 n.6).

24 Respondents argue that the state courts thus found that the factual basis of Ground Seven  
25 was available to petitioner at the time of litigating his first state habeas petition, that the court must  
26 treat this factual conclusion as presumptively correct under 28 U.S.C. § 2254(e)(1), and that the  
27 court should therefore reconsider its prior conclusion that Ground Seven is timely. Petitioner  
28 argues that reconsideration is not appropriate on several grounds, including that the court owes no

1 deference to the state court's factual finding when deciding whether a petition is timely under  
2 federal law, that even if deference applied in this context, the state court's finding is a mixed  
3 question of law and fact to which no deference is owed, and that the state court's factual finding  
4 is not inconsistent with this court's previous factual finding.

5 The court agrees with petitioner that reconsideration is not warranted. The Nevada Court  
6 of Appeals held that petitioner could have discovered that "the State also used the witness fee  
7 program" in time to raise the claim in petitioner's first state habeas petition. But the claim here is  
8 that the State was misusing the program by overpaying witnesses and that it did not disclose this  
9 fact to the defense. The state courts held that the witnesses were not overpaid, but neither made a  
10 finding regarding whether the evidence petitioner alleges supports his overpayment claim could  
11 have been reasonably discovered earlier. Given the undisputedly laborious process of collecting  
12 and analyzing all the receipts showing the witness payments, the court is not persuaded that due  
13 diligence required petitioner to scour through those receipts absent a reason to believe the State  
14 might have been exceeding the statutorily permitted amounts. That indication did not arise until  
15 the series of newspaper articles in late 2013. Accordingly, as there is no basis for the court to  
16 reconsider its prior decision, the motion to dismiss Ground Seven as untimely will therefore be  
17 denied.

### 18 **Procedural Default**

19 Respondents argue that even if the claim is timely, it is procedurally defaulted and should  
20 therefore still be dismissed.

21 A federal court cannot review even an exhausted claim "if the Nevada Supreme Court  
22 denied relief on the basis of 'independent and adequate state procedural grounds.'" *Koerner v.*  
23 *Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). In *Coleman v. Thompson*, the Supreme Court held  
24 that a state prisoner who fails to comply with the state's procedural requirements in presenting his  
25 claims is barred from obtaining a writ of habeas corpus in federal court by the adequate and  
26 independent state ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A state  
27 procedural bar is "adequate" if it is "clear, consistently applied, and well-established at the time of  
28 the petitioner's purported default." *Calderon v. United States District Court (Bean)*, 96 F.3d 1126,

1 1129 (9th Cir. 1996). A state procedural bar is “independent” if the state court “explicitly invokes  
2 the procedural rule as a separate basis for its decision.” *Yang v. Nevada*, 329 F.3d 1069, 1074 (9th  
3 Cir. 2003). A state court’s decision is not “independent” if the application of the state’s default  
4 rule depends on the consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th  
5 Cir. 2000).

6 Where such a procedural default constitutes an adequate and independent state ground for  
7 denial of habeas corpus, the default may be excused only if “a constitutional violation has probably  
8 resulted in the conviction of one who is actually innocent,” or if the prisoner demonstrates cause  
9 for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To  
10 demonstrate cause for a procedural default, the petitioner must “show that some objective factor  
11 external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*, 477  
12 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from  
13 raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice  
14 prong, the petitioner bears “the burden of showing not merely that the errors [complained of]  
15 constituted a possibility of prejudice, but that they worked to his actual and substantial  
16 disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v.*  
17 *Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

18 The Nevada Court of Appeals affirmed denial of petitioner’s second petition as untimely  
19 and successive. The Ninth Circuit has held that the Nevada Supreme Court’s application of the  
20 timeliness rule in § 34.726(1) is an independent and adequate state law ground for procedural  
21 default. *Moran v. McDaniel*, 80 F.3d 1261, 1268–70 (9th Cir. 1996); *see also Valerio v. Crawford*,  
22 306 F.3d 742, 778 (9th Cir. 2002). The Ninth Circuit also has held that, at least in non-capital  
23 cases, Nev. Rev. Stat. § 34.810 is an independent and adequate state ground for procedural default.  
24 *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207, 1210–12  
25 (9th Cir. 1999). However, in ruling that petitioner had no cause and prejudice to excuse the  
26 procedural bar, the state courts considered two of the three elements of the federal *Brady* claim.  
27 (See Ex. 218). Under these circumstances, the Ninth Circuit has held that the petitioner’s *Brady*  
28 and *Napue* claims are not procedurally defaulted. *Cooper v. Neven*, 641 F.3d 322, 332–33 (9th

1 Cir. 2011). Accordingly, the motion to dismiss Ground Seven as procedurally defaulted will be  
2 denied.

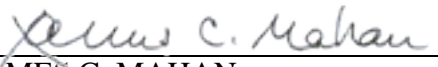
3 **Conclusion**

4 In accordance with the foregoing, IT IS THEREFORE ORDERED that respondents'  
5 motion to dismiss (ECF No. 56) is DENIED.

6 IT IS FURTHER ORDERED that respondents shall file an answer to the second amended  
7 petition within 60 days of the date of this order. Petitioner will have 30 days from service of the  
8 answer to file a reply.

9 IT IS SO ORDERED.

10 DATED February 7, 2019.

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13 JAMES C. MAHAN  
14 UNITED STATES DISTRICT JUDGE  
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